SUPREME COURT OF THE UNITED STATES

October Term 1940

No. 197

GEORGE W. CASHMAN,
PETITIONER

vs.

THE MARSHALL'S U. S. AUTO SUPPLY, INC.,
RESPONDENT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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STATEMENT

From consideration of the Petition for Writ of Certiorari, the sole and only point urged for a granting of the writ is that the United State Circuit Court of Appeals, Tenth Circuit, erred in its interpretation and application of Rule 59 of the Rules of Civil Procedure for District Courts, (28 U.S.C.A. following Section 723c), in deciding the appeal in favor of the respondent. No argument upon the point is proper unless an accurate statement of the facts of the case is considered in connection with the rule.

This was an action brought by George W. Cashman, to recover damages for personal injuries alleged to have been sustained through the negligent representations of an alleged

agent, servant or employee of appellant. The action was originally filed in the District Court of Shawnee County, Kansas, on September 8, 1938, and was removed to the District Court of the United States on September 30, 1938. (T. 5).

The respondent, The Marshall's U. S. Auto Supply, Inc., in April, 1938, operated a store located on the northeast corner of Seventh and Quincy Streets in the City of Topeka, Kansas, where it engaged in the sale of automobile tires and accessories. Seventh Street is an East and West street and Quincy Street is a North and South street. Henry Kerbs operated a small garage in a building on Seventh Street and adjacent to the East and rear of appellant's store. (Deft. Ex. A. T. 119). Respondents store manager, Ivan Smitherman, had an arrangement with Kerbs that Kerbs or his employee, Jesse De Camp would when requested mount tires for a flat fee of 15c per tire on occasions when respondent's own staff was unable to do that work. The other terms and legal effect of that arrangement are in dispute. Cashman charged in his petition (T. 6) that on April 23, 1938, he parked his 1927 Hupmobile Coupe on the East side of Quincy Street and North of appellant's store. He then bought a tire of Smitherman which included a mounting of the tire. Smitherman called DeCamp who came to the store to do that work. By reason of cogs broken from the fly wheel, Cashman advised DeCamp that his car required hand cranking. That DeCamp drove the car around and parked it at the north curb adjacent to the south side of appellant's store where he mounted the new tire upon the right rear wheel. That Cashman and Smitherman stood in the rear store door onto Seventh Street talking while the mounting was done. That when the work was completed and the old tire placed upon the rear of the car, DeCamp turned on the ignition, set the gas and choke, and handed the crank to Cashman who then asked him "if the car was ready to crank and the said DeCamp replied that it was all ready to be cranked. Thereupon the plaintiff relying upon the statement of DeCamp inserted the crank, the motor started and DeCamp having negligently left the car in low gear—the car jumped forward, pushed plaintiff—to and against the side of defendant corporation's building" causing him to be injured. The negligence charged was "that the injures complained of

were the direct and proximate results of the negligence of said DeCamp in leaving the automobile in gear and causing the plaintiff to rely upon his statement that the same was ready to be cranked when in truth and in fact it was not." (T. 7). The petition then charged "That DeCamp was at all times mentioned an agent, servant and employee of the defendant corporation and under the immediate direction and control of the said I. F. Smitherman, manager of the defendant corporation." (T. 8).

The appellant's answer (T. 8) denied these allegations generally and denied under oath that DeCamp or Kerbs were its agents, servants or employees. It further charged Cashman with contributory negligence:

> 1. That the plaintiff negligently and carelessly failed to make investigation before attempting to start the motor by hand cranking, when he knew he would be in a position of peril, to ascertain that said automobile was not in gear.
>
> 2. That plaintiff negligent'y and carelessly failed to make investigation before attempting to start the motor by hand cranking when he knew he was in a position of peril, to ascertain that said car was not in gear, when he knew or in the exercise of ordinary care should have known that the condition of the car was such that it was or should have been in gear when parked.

The Reply (T. 10) of plaintiff denied generally the allegations of the answer.

The appellant has contended at all times, first, that DeCamp was not its agent, servant or employee but was an independent contractor for whose acts, if any, appellant was not liable. Second, that if he be deemed an agent, servant or employee, that his special agency had terminated when the alleged negligent representation was made, if any were made, which is denied. Third, that DeCamp had finished the mounting of the tire about 5:00 o'clock P. M.; that he left the Kerb's Garage at six o'clock for his home and was not present when Cashman returned to Marshall's store sometime after six o'clock for his car; and that he was thereafter injured because of his own negligent acts as charged in the answer.

The evidence of the parties was in irreconcilable conflict on these issues of fact as is apparent by a reading of the transcript. For lack of space and because of the conflict we cannot here further abstract the evidence but refer the court to an analysis thereof under Point II, E of the argument.

Two jury trials have now been had. The action was first tried to a jury on December 16, 1938, and resulted in a verdict and judgment on Decembebr 17, 1938 for the defendant, The Marshall's U. S. Auto Supply, Inc. (T. 40). The plaintiff (petitioner) filed and served a motion for a new trial on December 27, 1938, which set forth the following grounds:

> "1. Newly discovered evidence which is material and which plaintiff and his counsel, with due diligence, were unable to produce at the trial.
>
> 2. Mistake and prejudice on the part of the jurors.
>
> 3. The Court inadvertently failed to fully and properly instruct the jury as to the law applicable in the case.
>
> 4. The verdict was secured by false testimony offered by the defendant." (T. 42)

No affidavits were filed or served with said motion as required by Rule 59 (c) of the Rules of Civil Procedure. The motion for a new trial was argued on Saturday, March 25, 1939, at which time there was filed and offered the affidavit of Robert Bannerman in connection with the first ground of the motion. (T. 43). The offer of the affidavit was objected to but the same was received and considered by the Trial Court. Thereafter, and on Monday, March 27, 1939, the Trial Court entered its order finding that a new trial should be granted upon all of the grounds stated in the motion for new trial and upon the further ground that the Court was not satisfied with the verdict. Upon this finding, the Trial Court entered its judgment as follows:

> "It is, Therefore, by the Court Considered, Ordered and Adjudged That said motion for new trial be and the same is hereby sustained upon all of the grounds stated in plaintiff's motion for new trial and upon the further ground that the Court is not satisfied with the verdict.

"It is further ordered that the verdict and judgment heretofore entered in this action be and it is hereby set aside and a new trial of all of the issues in said case is hereby granted and ordered." (T. 44).

Subsequent to the entry of this order and on April 7, 1939, the appellant served and filed its notice of appeal to the Circuit Court from said order upon the ground that the granting of a new trial was an abuse of discretion on the part of the Trial Court. When the Trial Court thereafter set the case for re-trial, a motion was filed directly in the Circuit Court for an order staying further proceedings in the District Court until the appeal was determined. The appellee then filed a motion in the Circuit Court to dismiss the appeal. Hearing was had before the Circuit Court at Oklahoma City, at which time the Court on April 18, 1939 dismissed the appeal on the ground that until there had been a final judgment entered in the case upon a re-trial that the error in the granting of the new trial could not be considered by the Circuit Court. The Marshall's U. S. Auto Supply, Inc., vs. George W. Cashman, 103 Fed. (2nd) 1015.

Thereafter and on June 7, 1939, the second trial of the action was begun in the District Court. (T. 44). At the conclusion of appellee's evidence, appellant moved to dismiss the action which motion was overruled. (T. 51). On June 8, 1939, after the introduction of evidence had been completed and following a noon recess, the appellant moved the Court to declare a mistrial and discharge the Jury by reason of misconduct on the part of a juror, Nathan D. Rash. (T. 67). Proceedings were then had upon said motion (T. 67 to 87), at the conclusion of which the court attempted to force the appellant to consent to the withdrawal of said juror and submission of the case to the remaining eleven jurors under penalty that if it did not do so the court would overrule the motion. The appellant declined to give such consent or make such election, and thereupon the court overruled the motion to declare a mistrial. The action was then argued and submitted to the original jury, and resulted in a verdict in favor of the appellee (T. 99, 115). Thereafter, motion for new trial was filed (T. 99) which was argued on June 27, 1939, and overruled on June 29, 1939. (T. 117). Thereafter on July 8, 1939, notice of appeal was duly filed (T. 118).

QUESTIONS INVOLVED ON THE APPEAL IN THE CIRCUIT COURT OF APPEALS.

On the appeal the errors in both trials were presented and argued. With reference to the first trial of December 16, 1938 resulting in a verdict and judgment for respondent, the question involved was:

1. Was the District Court guilty of an abuse of discretion in making and entering its order of March 27, 1939 granting appellee a new trial, and should therefore said order be reversed and the case remanded with instructions to re-enter judgment for appellant?

With reference to the second trial of June 7, 1939, resulting in a verdict and judgment for appellee, the questions involved were:

1. Did the District Court err in its order of June 7, 1939, overruling appellant's motion at the conclusion of appellee's evidence to dismiss the action?

2. Did the District Court err in its order of June 8, 1939, overruling the appellant's motion to declare a mistrial?

3. Did the District Court err in its order of June 29, 1939, overruling Appellant's motion for a new trial?

The Circuit Court decided the appeal upon the error assigned arising out of the first trial, to-wit: that the trial court was guilty of an abuse of discretion in granting petitioner a new trial. The Circuit Court concluded:

> "The judgment is reversed with costs, the order setting aside the verdict for defendant and granting a new trial is vacated, the verdict for defendant is reinstated, and the cause is remanded with direction to enter judgment for defendant on such verdict." (T. 131).

The Circuit Court found it unnecessary to consider the errors assigned in the second trial because "the conclusion which we have reached in respect of the action of the court in setting aside the first verdict and allowing a new trial renders it unnecessary to consider them." (T. 131).

Following this decision, a petition for rehearing was denied and, no application being made to the Circuit Court for a stay, mandate was issued to the District Court and filed therein on May 25, 1940.

ARGUMENT

I. No Special and Important Reasons Exist for Granting the Petition for Writ of Certiorari.

At many places in the petition for the writ and the brief, the petitioner has either failed to understand the decision of the Circuit Court or has misstated the point. For instance, on Page 2 of the petition, it is stated:

> "Upon appeal, the Circuit Court of Appeals reversed the case upon the sole ground that the (District) Court had no power to grant a new trial, either upon the grounds stated in plaintiff's motion or for the reason that the Court was not satisfied with the verdict."

This is not so. The case was reversed and remanded, not because the District Court had no power to grant a new trial, but (1) because there was a total and absolute failure of any showing or proof to support any ground of the motion and hence it was an abuse of judicial discretion to grant the motion, and (2) because the granting of a new trial on the Court's own initiative long after the time fixed by Rule 59 (d) had expired was in violation of the rule and constituted an abuse of discretion, particularly in view of the fact that the Court accepted and approved the original verdict when it was received and judgment was entered for respondent upon it.

Again on Page 5 of the petition for the writ the statement is made:

> "The (Circuit) Court also held that the grounds of the motion, as above stated, were not sufficient to permit the Trial Court to grant a new trial, in the absence of supporting evidence filed with the motion."

This is not so. The case was reversed because, as stated, there was absolutely nothing offered either in the motion or on the hearing of the motion to support any alleged ground. The true holding of the Circuit Court was that because of the total absence of any showing or proof, it was an abuse of judicial discretion to sustain the motion. Also that since the motion for new trial did not contend that the verdict for respondent was not supported by substantial competent evidence, that after the expiration of ten days from entry of judgment, the Court could only consider the grounds of the motion, and hence it was an abuse of discretion for the Court to order a new trial some ninety days thereafter on his own initiative in violation of Rule 59 (c).

Rule 59 of the Rules of Civil Procedure is plain and unambiguous. It needs no construction or interpretation. The Petitioner has constantly confused the issue by making arguments based upon the plain language of the Rule and totally disregarding the facts, which, when considered with the Rule, remove any question of the correctness of the decision of the Circuit Court. Under the headings "The basis upon which it is contended that the court has jurisdiction to review the judgment" (P. 5), "The questions presented" (P. 7), and "The reasons relied on for the allowance of the writ," (P. 8), the petitioner states his points in reverse. In other words, he contends that simply because a motion for new trial was filed, that the mere filing of the piece of paper,—the motion,—completely and finally relieved him of any further responsibility, and that thereafter any ruling on the motion, right or wrong, by the Trial Court was forever final regardless of abuse of discretion in the ruling. This is not so. The mere filing of the motion was not enough. Having made the motion, the burden was upon the petitioner to prove the grounds alleged and make such showing that the record would justify the granting of the new trial. Under no theory was there any burden upon the respondent. The net result was, as held by the Circuit Court, that there was total and absolute failure of any showing in the record to justify the granting of a new trial upon any ground of the motion, and hence there was an abuse of discretion in granting the motion. This conclusion is as elemental as two times two is four, and needs no argument. The petitioner argues that the record shows no

abuse, but deliberately refuses to face the fact that the record which he himself made is absolutely silent as to anything upon which any ground of the motion could have sustained. There was no strict and technical interpretation of Rule 59 (d). There was only the simple application of a rule that is so clear that he who reads may understand. It is the petitioner who would have read into the rule, something that is not there. While it is important that the rules be liberally construed, it is just as important that the rules be applied as written, because otherwise by unwarranted interpolation, the rules are emasculated and the results intended by this Court are defeated.

There are therefore no matters in this record of sufficient importance to necessitate or justify the exercise of the extraordinary jurisdiction of a full review in the Supreme Court of the United States. It is submitted that the petition for writ of certiorari should be denied.

II. The Circuit Court correctly Held that the Order of the Trial Court of March 27, 1939, Setting Aside the Verdict and Judgment entered thereon on December 17, 1938, and Granting a New Trial Was Erroneous and Should Be Reversed Because the Trial Court was Guilty of an Abuse of Discretion in making said Order.

This case was first tried on December 16, 1938, and resulted in a verdict in favor of the respondent on December 17, 1938, upon which judgment was that day entered for the defendant (T. 40). The appellee filed a motion for new trial on December 27, 1938. (T. 42.) This motion was argued on Saturday, March 25, 1939, and was immediately thereafter sustained on the following Monday, March 27, 1939 (T. 44).

The grounds assigned in the motion for a new trial were as follows:

"1. Newly discovered evidence which is material and which plaintiff and his counsel, with due diligence, were unable to produce at the trial.

2. Mistake and prejudice on the part of the jurors.

3. The Court inadvertently failed to fully and properly instruct the jury as to the law applicable in the case.

4. The verdict was secured by false testimony offered by the defendant." (T. 42.)

By the order of the Court sustaining said motion for new trial, the Court found and adjudged as follows:

"It is, Therefore, by the Court Considered, Ordered and Adjudged That said motion for new trial be and the same is hereby sustained upon all of the grounds stated in plaintiff's motion for new trial and upon the further ground that the Court is not satisfied with the verdict.

It is further ordered that the verdict and judgment heretofore entered in this action be and it is hereby set aside and a new trial of all of the issues in said case is hereby granted and ordered." (T. 44.)

It is specifically to be noted that the Court granted the motion *"upon all of the grounds stated in plaintiff's motion for a new trial and upon the fuurther ground that, the Court is not satisfied with the verdict."* The first contention of the respondent is that the record manifestly shows that none of the grounds in the motion had any semblance of merit and, therefore, the Court was guilty of an abuse of discretion when it found and adjudged that the motion should be sustained upon all of said grounds. We shall later in this brief consider the effect of the voluntary additional ground injected by the Court that it further sustained the motion upon the further ground "that the Court is not satisfied with the verdict." In order to clearly demonstrate the lack of merit to the grounds set out in the motion and to show the abuse of discretion, we shall discuss each of the grounds separately.

A. The Circuit Court correctly held that it was an abuse of discretion to grant a new trial upon the first ground of the motion.

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1. The affidavit of Robert Bannerman was a nullity and must be disregarded under Rule 59 (c).

The first ground of the motion for new trial was as follows:

"1. Newly discovered evidence which is material and which Plaintiff and his counsel with due diligence were unable to produce at the trial."

The only showing made upon this ground was the presentation of the affidavit of Robert Bannerman executed on March 23, 1938, and filed on the day that the motion for new trial was argued. (T. 43). The respondent contends that this affidavit was and is not a part of the record; that it was a mere nullity; and that it should have been wholly and entirely disregarded by the trial court. Rule 59 (c) of the Rules of Civil Procedure provides:

> "When a motion for a new trial is based upon affidavits, they shall be served with the motion. The opposing party has ten days after such service within which to serve opposing affidavits which period may be extended for an additional period not exceeding twenty days either by the Court for good cause shown or by the parties by written stipulation. The Court may permit reply affidavits."

The motion for a new trial was served and filed on December 27, 1938. The affidavit was not executed until March 23, 1939, and was not filed until the day of the hearing of the motion for a new trial on March 25, 1939. There was no justification under the rule for the filing of the affidavit and it was specifically not filed and served as required by the rule. The affidavit must therefore be deemed a mere nullity and must be disregarded as having any bearing on the first ground of the motion. If the rules, which have met with the general approval of the bar, are to mean anything this conclusion must be adopted. The appellant objected to the offer of the affidavit, and this was not disputed in the argument before the Circuit Court, but the trial court received the affidavit in evidence in utter disregard of the rule. Since said affidavit is a mere nullity and is to be disregarded as a part of the record under the rule,—then since there was absolutely no other showing made upon the first ground of the motion for a new trial, that ground goes out of the case. The granting of a new trial upon that ground was, therefore, clearly an abuse of discretion.

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2. The Circuit Court correctly held that even if said affidavit could be considered still under the record, it was an abuse of discretion to grant a new trial on the ground of newly discovered evidence.

In any event the argument of petitioner (Petition and Brief, p. 38) is of no benefit to him because he has entirely failed to

show that he has been prejudiced in any respect. The mere fact that the Bannerman affidavit was filed, did not alone prohibit the Circuit Court from even considering the contention that the granting of the new trial on the ground of newly discovered evidence was an abuse of discretion. But beyond the sound conclusion of the Circuit Court that the affidavit was a nullity and could not be considered by reason of Rule 59 (c), the Circuit Court correctly held that still under the record it was an abuse of discretion to grant a new trial on the ground of newly discovered evidence based solely on that affidavit.

In Prisament v. United States, 96 Fed. (2d) 865, a motion for new trial was urged in part upon the ground of newly discovered evidence supported by numerous affidavits attached thereto. In determining the correctness of the overruling of said motion, the Court first determined the tests to be applied and said

> "In the case of Johnson v. United States, 8 Cir., 32 F. 2d 127, on the question of newly discovered evidence, it was said (page 130): 'There must ordinarily be present and concur five verities, to wit: (a) The evidence must be in fact, newly discovered, i.e., discovered since the trial; (b) facts must be alleged from which the Court may infer diligence on the part of the movant; (c) the evidence relied on, must not be merely cumulative or impeaching; (d) it must be material to the issues involved; and (e) it must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal.'" (P. 866.)

Applying those tests to the evidence relied upon for a new trial, the Court concluded that "the record before us does not present any reversible error and the judgment of the District Court is affirmed."

Substantially the same language was used in Schick Dry Shaver v. General Shaver Corp., 26 F. Supp. 190, 191. See also U.S.C.A. Title 28, Sec. 391, note 91 et seq.

As to time of discovery, it was held in U. S. v. Smith (D. C. Or.) Fed. Cas. 16,341, that the newly discovered evidence must have come to the knowledge of the party since the trial and

must be so material that it would probably produce a different result. Again in Fikes vs. Bentley (Super Ct. Ark.) Fed. Cas. No. 4,785A, it was held that it must appear that the newly discovered evidence was unknown to the party at the time of the trial as well as to his counsel. In Ready Moving Company v. Taylor (C. C. N. Y.) Fed. Cas. No. 11,613, it was ruled that the knowledge and diligence of counsel are to be considered on the subject of new evidence the same as those of the party. In Knowlton v. Seneca Engineering Company, 36 Fed. (2d.) 395, a motion for new trial was properly held denied in the following language:

> "The particular relief sought herein is to vacate the judgment entered January 12, 1929, by order because of the discovery of new evidence tending to show that a material witness, who testified for plaintiff, was hostile, and might, if the facts had been elicited, have resulted in impeaching the witness. Such testimony was known to the secretary of defendant at the time of the trial, and was not communicated to counsel, and hence, in any event, does not constitute newly discovered evidence." (P. 395.)

The same result was reached in Roach v. Stastny, 104 F. (2d) 599 where the Court said:

> "We are also of the opinion that the Court was not bound to order a new trial on the ground of newly discovered evidence in order to enable appellant to set forth facts within his own knowledge at the time of the trial, even though their existence may not have been known to his attorney then, and their significance was not known to himself." (P. 562.)

As to diligence, since the authorities are voluminous, we shall cite only a few cases to the effect that the movant and his counsel must affirmatively show not only their diligence but that with due diligence the evidence could not have been discovered before the trial.

In Tomljanovich v. Victor American Fuel Company, 232 Fed. 662, the defendant filed affidavits that a witness for the plaintiff had made certain statements prior to the trial affecting his credibility. Though these affidavits were taken immediately after

the trial, no satisfactory reason for not interviewing the affiants before the trial was given or shown in the record. It was held that the defendant had not met the burden of showing due diligence in the production of the alleged newly discovered evidence especially as the evidence was of an impeaching character.

In Sun Life Assurance Company v. Budzinski, 25 Fed. (2d) 77, the Court said:

> "We are of opinion that the application does not show the testimony now regarded as newly discovered was not by proper diligence available at the trial and therefore the application fails to show that legal requisite for the allowance of such a motion." (P. 78.)

In Blue Diamond Company v. Chas. M. Allen & Son, 56 Fed. (2d) 1, the plaintiff recovered judgment upon a breach of a contract to furnish mortar in accordance with architects specifications. The plaintiff produced evidence at the trial to prove a contract as to the quality of mortar to be furnished. The defendant on motion for new trial claimed that it was surprised and that newly discovered evidence nullified the plaintiff's contention that there was a contract as to quality. In approving the denial of the motion for new trial, the Court said:

> "Denial of the motion for a new trial is also assigned as error, but clearly no abuse of the trial court's discretion is shown. Appellant must have known that appellee would undertake to prove the existence of the contract alleged, and by the exercise of reasonable diligence could have ascertained as well before as after the trial what it is now claimed a member of the firm of subcontractors would testify." (P. 3.)

See also Warren v. United States, 42 F. (2d) 755, 756.

The alleged newly discovered evidence must be material and important evidence. In McConnell v. United States, 26 F. (2d) 798 a motion for new trial on the ground of newly discovered evidence was supported by affidavits but said the Court "what relation such testimony would have to the evidence upon which the conviction was had, we can only conjecture." Under such circumstances the Court properly denied the motion. See also

Banque Francaise De Syrie v. Providence-Washington Ins. Co., 22 F. (2d) 463, 464.

The alleged newly discovered evidence must also be not merely cumulative. In Payton v. Ideal Jewelry Mfg. Company 7 Fed. (2d) 113, the Court held:

> "After the District Court rendered its decision in this case the defendant moved for a new trial on the ground of newly discovered evidence, supporting his motion with affidavits setting forth the evidence relied upon. The denial of this motion is assigned as error. The evidence in question is largely cumulative, and apparently was known to the defendant at the time of the trial, and by reasonable diligence could have been obtained and submitted at that time had he seen fit. Furthermore we think the evidence was not of a character that would change the result. Such being the case, the defendant takes nothing by this assignment." (P. 115.)

Morton Butler Timber Co., et al, v. United States, 91 Fed. (2d) 884:

> "The District Court did not err in refusing to grant new trial upon newly discovered evidence, where subject matter of such evidence was merely cumulative and tended only to attack credibility of witnesses and weight to be given their testimony." (P. 886.)

See also Lancaster v. United States, 39 Fed. (2d) 30; Chambers v. Anderson (6th C. C. A.) 58 Fed. (2d) 151; Old Dominion Stages v. Cates, 65 F. (2d) 258.

As a general rule new trials on the basis of newly discovered evidence are not favored. Casey v. United States, 20 Fed. (2d) 752, 754. Also, as stated in the 5th syllabus of United States v. Lindsly, 7 Fed. (2d) 247:

> "Ex parte affidavits, prepared by some one else for signature of witness, have not the same evidentiary value as the sworn testimony in open court of the same witness, supported by his written report signed by him, which he then verified as truthful."

A further requirement is that the alleged newly discovered evidence would have caused a different result. In Wulfsohn v. Russo-Asiatic Bank 11 Fed. (2d) 715, the Court said:

> "Error is assigned in the denial of a motion for a new trial. Such motions are addressed to the sound discretion of the court, and orders denying them are not subject to review on writ of error, in the absence of a plain abuse of discretion. Here the motion was based on the ground of newly discovered evidence, and was properly denied for two reasons: First, the newly discovered evidence would not change the result; and, second, in large part, the evidence was not newly discovered at all." (P. 718.)

See also Isgrid v. United States, 4 Cir., 109 F. (2d) 130, 134.

That the appellate court may correct the ruling upon a motion for new trial where there is an abuse of discretion in sustaining the same was further announced in the recent case of Cottingham v. Hershey, 71 F. (2d) 473. This was an action by the plaintiff to recover upon an alleged oral agreement for the repurchase of stock sold to the plaintiff by the defendant. The trial resulted in a verdict for the plaintiff and from an order granting a new trial the plaintiff appealed. On the motion for new trial the defendant produced proof tending to prove that the contract was entirely written and not oral and that had the true facts been presented a different result would have occurred. The Circuit Court held that the new trial was erroneously granted. The Court said:

> "The new trial and the amended affidavit of defense were allowed by the Court because of its conclusion that this was necessary in order to prevent a grave injustice being done. In spite of a thorough study of the petition for a new trial, the amended affidavit of defense, and the exhibits, we cannot reach a similar conclusion. No new facts were discovered by the defendant after trial. When the defendant prepared for trial, he had knowledge as to the facts now sought to be pleaded, and he was not precluded from pleading these facts by accident, mistake, or misfortune. The amendments requested and allowed at this late stage of the proceedings amount to a new defense. The allowance of the amendments, the new defense, and the new trial trends to

offer an inducement to perjury, since in the new affidavit of defense the defendant has sworn to facts which cannot be true if the averments in the original affidavit of defense are true. We conclude that the allowance of the amendments and the new trial was not made by the Court in the exercise of a sound discretion, but was an expansion of discretionary power beyond the limits to which that power may lawfully be extended. American Mills Co. v. Hoffman (C. C. A.) 275 F. 285. Great Northern Railway Co. v. Herron (C. C. A.) 136 F. 49.

The cause is remanded to the Court below for further proceedings not inconsistent with this opinion." (P. 474-475.)

See also James v. Evans, 149 F. 136; Felton v. Spiro, 78 F. 576.

The respondent contended that none of the elements or conditions precedent required before a new trial could be granted upon the ground of newly discovered evidence, existed in the case at bar. At the time of the hearing of the motion for new trial only the affidavit of Robert Bannerman (T. 43) was offered and nothing else. The affiant was not produced in open Court where he could be interrogated and cross examined. More than this, the plaintiff Cashman did not make any showing either by testimony or by affidavit as to when he first learned of the alleged newly discovered evidence offered by Bannerman. The plaintiff, in his Petition, alleged the purchase of the tire and that it was mounted by DeCamp. He charged DeCamp with having made negligent representations to him when he cranked the car, and that the same resulted in his injury. Plaintiff and his counsel knew by the answer that all such allegations were denied. They necessarily knew in order to recover tha it would be necessary for them to prove that Cashman and DeCamp were both present at the same time in order that the alleged negligent representations could have been made. The plaintiff obviously knew at all times both before and after the case was filed where he had been in the City of Topeka on the afternoon of the day of the accident and at the various times thereof. The plaintiff knew whether or not he had been out to the place of business of Bannerman. If he did not recite the course of his journeys that afternoon to his attorneys either

before the case was filed or during the preparation thereof for trial, that was either his own negligence or his own failure to appreciate their significance. Counsel for plaintiff did not testify at the hearing or make any showing as to when they first learned of this possible witness. Sofar as the record is concerned, plaintiff's counsel may have known of this witness for months and did not investigate to determine whether or not his evidence was important. It should be noted that the accident occurred on April 23, 1938; the action was filed on September 8, 1938; and was first tried on December 16, 1938. The slightest diligence on the part of plaintiff and his counsel would have revealed what, if anything, Bannerman knew. There is absolutely nothing in the record to explain away this lack of diligence or to show that the plaintiff did not know of and could not have produced this witness at the time of trial.

There is nothing in the record from which the Trial Court or this Court could say that the evidence of Bannerman was material, or that it was not merely cumulative. Mr. Cashman testified

> "I bought it, as near as I can say, around 6:00 o'clock on this Saturday." (T. 14.)

He then proceeded to relate his version of subsequent events; that DeCamp was called; that DeCamp moved his car from Quincy Street to Seventh Street; that DeCamp mounted the tire in the street while Cashman stood in a back doorway with the store manager, Smitherman, and talked; that when it was done DeCamp opened the car door to get the crank out; that he told DeCamp that he could crank the car easier than DeCamp could; and

"A. So he put the ignition on and I asked him if it was ready and he said it was. He handed me the crank then and I just placed the crank in the car and pulled up on it once because the car is very easy to crank and when I did, why it just jumped all over me, knocked me down." (T. 14.)

The appellee called Earl Good as one of his witnesses who testified:

> "I know Jesse DeCamp. I can't be positive that I saw him when I arrived but I am fairly sure he was there. I

> can't be positive, but it is my best judgment that he was there that night. He was dressed in working clothes—had a pair of overalls on and was hatless." (T. 20.)

The appellee also called his brother-in-law, Carl G. Lawhun, who testified:

> " I recognized this man as DeCamp, who is now in the Courtroom . . . If I am not mistaken, the boy I saw backing the car away from the curb on Quincy Street five or ten minutes before, turned off the switch as we left." (T. 20.)

The appellant has contended at all times that Cashman purchased the tire around 4:30 o'clock P. M., and after purchasing the tire, left appellant's store and did not return until after 6:00 o'clock P. M. That DeCamp, who mounted the tire earlier in the afternoon inside the Kerbs' Garage, was not present at the time of the accident but had previously left the Kerbs' Garage for his home. The affidavit of Robert Bannerman is merely cumulative to that evidence which was offered by the appellee upon his theory that the transaction did not take place at the time claimed by the appellant and that consequently, DeCamp must have been present. The only statements in the affidavit bearing upon the question are as follows:

> "That on the afternoon of the 23rd of April, sometime past mid-afternoon and in this affiant's best judgment about 4:00 o'clock, the said George W. Cashman came to this affiant's place of business in his Hupmobile Coupe and after being there some considerable time and transacting business with this affiant, left. . . ." (T. 43.)

The affiant then states that he fixes the date and approximate time of the day that Cashman was at his place of business by reason of the fact that he read of the accident in the paper on the morning following, which stated the accident occurred at about 6:00 o'clock, and

> "That he then recalled and now recalls that George W. Cashman had been gone from this affiant's place of business in the neighborhood of one hour prior to the time that the paper stated that the said George W. Cashman had been injured." (T. 43.)

It will be observed that the affiant was hopelessly indefinite in his ability to fix the precise time either when Cashman was at his place of business, or how long he had been gone prior to 6:00 o'clock. We submit that such a statement in an affidavit drawn by plaintiff's counsel did not state facts of sufficient importance to justify a finding that if this witness had testified at the trial, that all of the evidence of the defendant's witnesses would have been disbelieved by the Jury and that there necessarily would have been a different result.

Beyond this, in view of the indefiniteness of the affidavit, there is nothing therein that would have been inconsistent with the appellant's theory of the case. If Cashman had been at Bannerman's place of business sometime past mid-afternoon; had left there and had been gone in the neighborhood of an hour, Cashman could still have had full opportunity to have driven to defendant's place of business, purchased the tire around 4:30 P. M., have left his store and remained away as defendant claims until after 6:00 o'clock, and could have returned at that time and the accident occurred between 6:15 and 6:20 o'clock P. M. after DeCamp had left for his home. So again, the materiality of the alleged newly discovered evidence does not appear. It is significant that when the case was re-tried on June 7, 1939, Bannerman was then called by the plaintiff as his witness or rebuttal. His testimony at that time was as follows:

> "I recall that he was at our place of business the day before in the late afternoon. He was there about an hour."

On cross examination, he testified:

> "When Mr. Cashman came out to our place, it was after mid-afternoon, about 4:00 o'clock or somewhere near there. I have no way of saying whether it was a half hour before or a half hour afterwards. All I can say is it was sometime in the latter part of the afternoon. I know it was after 3:00 P. M., but I don't know just when. I was working at the mill while he was there. I am not positive how long he was there and cannot express any judgment about it. . . . My statement that he was there about an hour would have to be purely a guess. I didn't pay any attention to it at the time. I had no reason to remember it." (T. 64.)

It is obvious, from a consideration of this testimony at the second trial, that the witness was then as vague and indefinite as to time as he was in his original affidavit. It is obvious from a casual consideration of the affidavit and the testimony that his evidence was not material, or was in any event merely cumulative to other evidence produced by the plaintiff, and certainly it cannot be reasonably said that if he had testified at the first trial there would, of necessity, have been a different result.

The administration of justice does not dictate a continual granting of re-trials without lawful justification therefore until a result to the liking of a particular Court is forced upon a party. In conclusion, it is submitted that the first ground of the plaintiff's motion for a new trial for newly discovered evidence wholly fails as a ground to justify the granting of a new trial and consequently, it was correctly held by the Circuit Court that the Trial Court abused its discretion in granting the new trial upon this ground.

B. The Circuit Court correctly held that it was an abuse of discretion to grant a new trial upon the second ground of the motion.

The second ground of the motion for new trial was as follows:

"2. Mistake and prejudice on the part of the jurors."

We challenge the record for any showing made upon this ground, and in fact there was no showing made in support of it. Absent any showing or proof in the record that there was mistake or prejudice on the part of the Jury, it follows without further argument that the Trial Court was guilty of an abuse of discretion in reaching out into thin air to grant a new trial upon this ground. Where competent evidence has been introduced and the verdict is not so against the weight of evidence as to show that it was reached through passion, prejudice, or other improper motive and no error of law intervenes, the verdict must be sustained. William Camp and Sons, Ship and Engine Building Company v. Sloan, 21 F. 561. A mere casual inspection of the evidence on behalf of the appellant produced in the first trial will disclose that there was an abundance of substantial competent evidence to support the verdict, and which in view of the result, the Jury believed and upon which they re-

turned a verdict for the defendant. It was therefore correctly held to be an abuse of discretion to grant a new trial upon this ground.

C. The Circuit Court correctly held that it was an abuse of discretion to grant a new trial upon the third ground of the motion.

The third ground of the motion for new trial was as follows:

"3. The Court inadvertently failed to fully and properly instruct the jury as to the law applicable in the case."

This ground was not available to the plaintiff. Rule 51 of the Rules of Civil Procedure provide in part:

> "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the Jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

At the trial and after the Trial Court had instructed the Jury, the following took place:

> "By the Court: Are there any suggestions or objections by the plaintiff?
>
> Mr. Rooney: No, your honor.
>
> The Court: Or by the defendant?
>
> Mr. Griffith: No, your honor." (T. 40.)

Thus, the record affirmatively shows that the instructions as given by the Court were acceptable to both the plaintiff and the defendant. It affirmatively shows that the appellee did not make any objection to the instructions and therefore, by the specific requirement of the Rule, error could not be claimed that the Court failed to fully and properly instruct the Jury. The instructions as given by the Court thereby became and at all times since have been the law of the case. We further note that the record is silent as to any showing of any kind in support of this ground. It therefore follows again that when the Trial Court granted a new trial upon this ground, he did so without legal authority or excuse, and that the sustaining of such ground was clearly an abuse of discretion.

D. The Circuit Court correctly held that it was an abuse of discretion to grant a new trial upon the fourth ground of the motion.

The fourth ground of the motion for new trial was as follows:

"4. The verdict was secured by false testimony offered by the defendant."

We again challenge the record to show that the plaintiff offered anything to establish or prove that the testimony of the defendant's witnesses was false or perjured. No showing of any kind was made and the record is entirely silent. In such a situation, it was an expansion of discretionary power beyond the limits to which that power may lawfully be extended, for the trial Court to reach out again in thin air and grant a new trial upon this ground. The result is that the sustaining of the motion for a new trial upon this ground was likewise clearly an abuse of discretion as the Circuit Court held.

We have now covered all of the grounds alleged in the plaintiff's motion. It is obvious that the motion for new trial failed upon any ground assigned as there was no legal justification or excuse in the record for the granting of the same upon any ground assigned. We submit that where there is no showing of any kind made justifying a new trial, that it is a clear abuse of discretion for the court to grant a new trial based entirely upon conjecture, speculation or for personal reasons. In such event the granting of a new trial is an arbitrary, capricious, unreasonable act and is an abuse of the powers of the Court. Therefore, the plaintiff's entire motion for a new trial should have been overruled and the Court's action in sustaining the motion upon all of the grounds stated in plaintiff's motion for new trial was, as held by the Circuit Court, clearly an abuse of judicial discretion.

E. The Circuit Court did not predicate its decision solely upon the insufficiency of the motion for new trial as a mere matter of pleading.

The argument of Petitioner under part 2(a) of his argument as well as other points seems predicated upon an erroneous assumption that the Circuit Court predicated its decision entirely upon the insufficiency of the Appellee's motion for new trial as a matter of pleading. A mere casual reading of the opinion will show the contrary. The Circuit Court held that upon

each of the grounds stated in the motion for new trial, there was absolutely no proof or showing of any kind made before the Trial Court in support of any of the grounds. In other words, the record was entirely silent as to any basis upon which the Trial Court could have exercised any discretion whatever. The burden was, of course, upon the Appellee to have made such a showing and when he entirely failed in this respect, there was no conclusion other than that the granting of a new trial was a clear abuse of judicial discretion and an expansion of power to review beyond the limits to which that power could be lawfully exercised. The argument of Petitioner seems to be that as soon as a motion for new trial was filed in any form, that the burden of proof shifted to Appellant to disprove the mere conclusions contained in the motion, and that Appellee was relieved of the necessity of making any showing in support of the grounds of the motion either by the motion or otherwise. Such is not and never has been the rule. It was only after a consideration of the entire record which was brought up to the Circuit Court, that that Court looked to the motion to see if there was anything in it beyond the silence of the record to justify the action of the Trial Court. As the Circuit Court said in its opinion, there was nothing in the motion in the way of allegations to aid the utter lack of showing made by Appellee to indicate any basis for the granting of the new trial. Under these circumstances, it is a clear waste of words for Appellee to urge a granting of the writ of certiorari.

We sincerely doubt that if there has ever been a record presented to the Circuit Court which shows so clearly and affirmatively that there was no basis for the action of the Trial Court in granting a new trial. We do not dispute the soundness of decisions to the effect that upon showing made, the right of a Trial Court to review a verdict is a valuable right, but petitioner predicates his whole argument upon the proposition that simply because a motion is filed and regardless of its form, any ruling at all granting it is final, and seems to forget entirely the proposition that Courts must rule reasonably and not arbitrarily and capriciously without rhyme or reason. The Circuit Court has found upon an examination of the entire record that there was no basis whatever for the granting of the new trial. Consequently, its decision is sound that an abuse of judicial discretion clearly and affirmatively appeared.

F. The Circuit Court correctly held that it was an abuse of discretion to grant a new trial upon a ground injected by the Court of its own initiative in violation of Rule 59 (d) of the Rules of Civil Procedure.

The Trial Court in his order of March 27, 1939, granting a new trial sustained the same

> "upon all of the grounds stated in plaintiff's motion for a new trial, and upon the further ground that the Court is not satisfied with the verdict." (T. 44.)

The additional ground upon which the Trial Court purported to grant the new trial was that the Court was not satisfied with the verdict. This was without question an order directing a new trial on the Court's own initiative, and was in violation of Rule 59 (d) of the Rules of Civil Procedure. This Rule provides

> "(d) On initiative of the Court. Not later than ten days after entry of judgment, the Court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor."

The verdict in the first trial for the defendant was returned and filed on December 17, 1938, and the judgment entered thereon on that date. (T. 40, 42.) It is significant that the petitioner in his motion for new trial did not assign as any ground therein, a claim that the verdict and the judgment thereon were contrary to the evidence or that there was a lack of substantial competent evidence to support the verdict and the judgment. If the plaintiff was satisfied that there was substantial competent evidence to support the same, then certainly the Court should have been. But here, more than three months after the entry of the judgment, the Court on its own initiative and in violation of the Rule attempted to grant a new trial upon such a basis. The order, therefore, granting a new trial upon this additional ground was clearly an abuse of discretion. The Rules of Civil Procedure which have been adopted and which have met with general approval of the Bar must be enforced and followed. The Trial Court in this instance deliberately failed and refused to observe the Rule and to comply therewith, and such an order, being er-

roneous, was properly reversed by the Circuit Court. As stated in James v. Evans, 149 F. 136:

> "And where a new trial is awarded solely by reason of an erroneous opinion that under the pleadings, the verdict could not by any possibility lawfully have been found, there is in legal contemplation an abuse of discretion which can be corrected by writ of error."

See also Pettingill v. Fuller, 2 Cir., 107 F. 2d 933, 936.

As stated before, if the Trial Court could on March 25 to 27, 1939, have considered such a ground and ordered a new trial because the Court was not satisfied with the verdict, that would have been on the ground that the verdict and the judgment were contrary to or not supported by the evidence. Even if the Court could have considered such a ground as properly in issue through claim properly made, the rule is that it is not sufficient ground for a new trial that the verdict is merely against a preponderance of the evidence or that the Court might have arrived at a different result; but the verdict must be manifestly and palpably against the evidence. (Weed v. Lyons Petroleum Company, 294 F. 725, affirmed (C.C.A. 1924) 300 F. 1005.)

We submit that a casual consideration of the record of the evidence offered by the defendant will disclose an abundance of substantial competent evidence to support the verdict for the defendant.

Under the issues, and aside from the question as to whether DeCamp was an agent or servant of appellant at the time charged, the issue on the facts was: Did DeCamp make the alleged negligent representation. This issue of fact was clear cut and the evidence of the parties was in irreconcilable conflict as to whether or not DeCamp was present at the scene and at the time of the accident. The appellee claimed that he was and the appellant contended that he was not. Obviously both situations could not have existed or been true. It was the province of the jury to determine the true fact.

The only direct evidence that the alleged negligent representation was made, was that of Cashman himself who testified that he bought the tire around six o'clock; that he walked to

the front of the store but did not go outside and saw that DeCamp was having difficulty in cranking the car; that after the tire was mounted at the curb on Seventh Street he told DeCamp that he could crank the car easier and

> "A. So he put the ignition on and I asked him if it was ready and he said it was. He handed me the crank then and I just placed the crank in the car and just pulled up on it once because the car is very easy to crank and when I did, why it just jumped all over me, knocked me down." (T. 14.)

He further testified that his brakes had last been inspected in August, 1937, and were in good condition.

Mrs. Cashman testified that when she arrived after the accident, there was quite a crowd around but she did not think she was mistaken that it was DeCamp who told her a car had knocked her husband down. (T. 15, 16.)

Earl Good testified that he went to the scene shortly after six o'clock and

> "I know Jesse DeCamp. I can't be positive that I saw him when I arrived, but I am fairly sure he was there. I can't be positive but it is my best judgment that he was there that night. He was dressed in working clothes—had a pair of overalls on and was hatless." (T. 19, 20.)

Carl G. Lawhun, a brother-in-law, who operated a filling station two blocks away, testified that he drove past the intersection of Seventh and Quincy Streets between 6:00 and 6:10 P. M. and

> "I saw it (the Hupmobile) that night in front of Marshall's store and some young man was backing it out from the curb. I recognized this man as DeCamp, who is now in the courtroom. I received a phone call about the time I reached the station. I then took Mrs. Cashman who was at my station to Seventh and Quincy . . .
>
> "There was quite a number of people about. If I am not mistaken that boy that I saw backing the car away from the curb on Quincy Street five or ten minutes before, turned off the switch as we left." (T. 20.)

Contrasted to this testimony was all of the evidence on behalf of the appellant. Ivan Smitherman testified that Cashman bought the tire two or three hours before the accident; that Cashman and DeCamp went out the front door to the car together and that Cashman did not return to the store until after six o'clock when he paid for the tire; that he knew nothing of the accident until he ran out the rear door after call by Mr. Kientz and

> "There was positively no one around the car at the time I went out the rear door with Mr. Kientz. I did not at any time see Henry Kerbs or Jesse DeCamp." (T. 22-24.)

Jesse DeCamp testified that he and Cashman both went out the front door on Quincy Street together to the car parked on that street at which time Cashman said that his car had to be hand cranked and

> "He said for me to get in and he would crank it. I handed him the crank and he cranked the car . . . I drove it around into the inside of the Kerbs' Garage where I changed the tire. When I got in the car and before Cashman cranked it, I saw that the car was in low gear . . . I then drove the car out of the garage and parked it on the south side of the Marshall's store . . . I parked the car at an angle. This whole transaction of going out, getting the car, mounting the tire and reparking the car took about fifteen minutes." (T. 25.)

> "Seventh Street slopes to the east. There is also a slope in the curb inset . . . When I parked the car at an angle I put it in reverse gear to keep it from moving or rolling . . . I did not put on the hand-brake because it didn't work. I pulled the hand-brake and the car wouldn't stand and so I released the hand-brake and put the car in reverse. I put it in reverse gear because that is the lowest gear and will hold better. It was a matter of habit for me to use that particular gear. (T. 26.)

> "When I left the garage at six o'clock with Mr. Kerbs, Mr. Cashman was not there. I was not present when the accident occurred. I did not know there had been an accident until the following Monday morning. It was a little

after five o'clock or somewhere around there when I parked the Cashman car on Seventh Street." (T. 26.)

"I never at any time saw Cashman between the time he cranked his car on Quincy Street and the time I left for home at six o'clock. I never at any time made any statements to Mr. Cashman that his car was ready to be cranked. I heard Mr. Cashman's testimony that he was with me while I changed the tire on Seventh and that after I completed, I took the crank out of the car, came around, handed it to him and told him the car was ready. That did not happen. Of that I am absolutely positive." (T. 27.)

"On the afternoon of the accident I was dressed in a gray shirt and pants. I did not have on overalls. I wore one of these paint caps. It was out there on Quincy Street when I first went to get the Cashman car that I did hand the crank to Cashman." (T. 28.)

Henry Kerbs testified that he told DeCamp to install the tire; that DeCamp brought the Cashman car into the garage within ten minutes after he left, mounted the tire and then took the car out of the garage; that when he and DeCamp left together in the Kerbs car for their homes at six o'clock, that he saw the Cashman car parked on the south side of Marshall's store and

"I did not see Mr. Cashman that day and have never seen him until today. He was not in our garage when the tire was being mounted. I did not see him on the street when DeCamp and I left the garage at six o'clock; nor did I see him at or about his car or in the south doorway of the Marshall's store. I say to the Court and jury that Cashman was not there. I did not learn that there had been an accident until the following Monday afternoon." (T. 29.)

Clarence Kientz of Dennison, Kansas, and a customer of the store testified that he was in the store for about two hours; that he overheard the purchase of the tire by Cashman and then saw him leave the store by the front door onto Quincy Street; that it was probably an hour and a half when he next saw Cashman and that in the interim Cashman was not in the store. (This would fix the purchase of the tire at about 4:30 P. M.) That Cashman on returning paid for the tire and went out the back door onto Seventh Street; shortly he heard something that

sounded like an accident at about 6:15 or 6:20 P.M.; that on going out he found Cashman pinned between his car and the side of the building, and

> "When I heard the noise and knew that something had happended that night and when I went out the rear door of the Marshall's store, neither Kerbs nor Jesse DeCamp was there because there was nobody at or around the car when I went out." (T. 29, 30.)

That Smitherman at Cashman's request phoned the brother-in-law, Lawhun, and

> "When Mrs. Cashman arrived she asked me what happened. I told her her husband must have cranked his car in gear and it ran over him. I recognized the lady who testified as Mrs. Cashman as the lady who talked to me that night." (T. 30.)

On this positive evidence, the jury returned a verdict for appellant. They obviously believed appellant's witnesses; found that Cashman had confused the occasion of DeCamp handing him the crank on Quincy Street with the accident on Seventh Street; believed that Cashman simply cranked his car on Seventh Street without taking any precautions to see that his car was out of gear before cranking it; and that his own negligence was the cause of his injuries. That such negligence would bar recovery is amply supported by Cook v. Sanger, 110 Cal. App. 90, 293 P. 794. From the testimony set forth, this Court will agree with the Circuit Court that there was an abundance of competent substantial evidence to support the verdict for the Marshall's U. S. Auto Supply, Inc.

The conduct of the Trial Court in apparently misconceiving his function is all the more evidence of an ignorant or willful abuse of discretion or exercise of his powers. The case of American Cooler Company v. Fay and Scott 20 F. Supp. 782, is so much in point that we quote at length therefrom. The case, which was tried to a Jury with a verdict for the defendant, came before the Court upon the motion of the plaintiff to grant a new trial on the ground that the verdict was against the law of the case and the weight of the evidence. In disposing of this contention, the Court said:

"The verdict was arrived at after a careful trial, with able counsel participating, with no apparent errors and with instructions to the jury which were not excepted to. There is no reason to think that the jury failed to exercise a deliberate and unbiased judgment or that it was influenced by any prejudice, unless such can be inferred from the verdict alone. There was a direct and irreconcilable conflict of testimony. The jury, after apparently adequate instructions, including the rule as to burden of proof, adopted the view of the facts as testified to by the witnesses for the defendant. The Court or another jury might take another view of the matter, but under our procedure that is not the question. It is not sufficient ground for a new trial that a verdict is merely against the preponderance of the testimony. It must be so manifestly and palpably against the evidence in the case as to compel the conclusion that the verdict is contrary to right and justice. Judge Lurton, in the case of Mt. Adams & E. P. Inclined R. Co. v. Lowery (C.C.A.) 74 F. 463, 465, 473, said:

" 'Where the evidence submitted to the jury is such as to render the issue doubtful, a new trial will not be granted, even though the verdict is against the apparent weight of evidence. Brown v. Wilde, 12 Johns. (N.Y.) 455; Stryker v. Bergen, 15 Wend. (N.Y.) 490, 491.'

"The following is from the opinion of the Court in Donohue v. Dykstra (D.C.) 247 F. 593, 594, referring to and following the Mt. Adams Case: 'It is, of course, well settled that if there is any real conflict in the testimony, and there is any substantial evidence to support the verdict found, such verdict should not be set aside by the Court, even if the latter would have reached a different verdict from that of the jury on the same evidence."

"Where there is a conflict of testimony, it is presumed that the jury gave the various items of testimony their real worth in marshaling the probabilities. A new trial will not be granted where to do so would amount to a substitution of the judgment of the Court for that of the jury."

"The Supreme Court in the case of Pleasants v. Fant, 22 Wall. 116, 122, 22 L. Ed. 780, in speaking of the duty

of the court in its relation to the jury to protect parties from unjust verdicts arising from ignorance of the rules of law and of evidence, from impulse or passion or prejudice, or from any other violation of the lawful rights of the parties in the conduct of a trial, said:

" 'In the discharge of this duty it is the province of the court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor. Not whether on all the evidence the preponderating weight is in his favor, that is the business of the jury, but conceding to all the evidence offered the greatest probative force, which according to the law of evidence it is fairly entitled to, is it sufficient to justify a verdict? If it does not, then it is the duty of the court after a verdict to set it aside and grant a new trial.'

"There is no ground for a claim that the jury violated any instructions as to the law or that it was left in ignorance as to any rules of law pertinent to the case. If the jury had a right to accept the story of the defendant's witnesses as to the facts surrounding the contract in suit, the verdict could have been properly rendered for the defendant."

Inasmuch as there was an abuse of discretion in the granting of the new trial upon all of the grounds stated in the motion for new trial and upon the further ground injected by the Court on his own initiative, it is submitted that the entire order (T. 44) granting a new trial was erroneous. Having been granted by reason of an abuse of discretion, the ruling was subject to correction by the Circuit Court. It follows that the Circuit Court correctly held that said order of March 27, 1939, granting a new trial should be reversed with directions to the trial Court to enter judgment for the respondent.

The Petitioner complains that the opinion of the Circuit Court unduly restricts the power of a Trial Court to grant a new trial on his own initiative in violation of Rule 59 (d) of the Rules of Civil Procedure. We might first note that all of the cases cited were cases cited prior to the adoption of the new rules. The purpose of the rule was to prevent Trial Courts long after a case is tried and judgment entered from ordering a new trial

for some reasons *other than those claimed by the parties themselves.* Beyond this, as stated before, the Petitioner in his motion for new trial did not claim or urge that the verdict returned in the first trial was not supported by substantial competent evidence. If the Appellee was satisfied that the verdict was so supported, then certainly there was nothing to challenge the attention of the Trial Court to the contrary. The fact that the Trial Court was originally satisfied with the verdict is further evidenced by the fact that it was received and approved and judgment forthwith entered upon it. No order was made directing the withholding of entry of judgment upon the verdict when it was received. Further, the petitioner did not make any such request. Certainly under these circumstances the Appellee cannot be heard to urge an interpretation of the rule contrary to the plain, unambiguous language of the rule itself.

Conclusion.

In conclusion, respondent cannot refrain from again observing that the petitioner did not, either in his motion for new trial, in the hearing thereon, in the record, in his original Brief, in the argument before the Circuit Court, and in the petition for rehearing, even claim or assert that any showing of any kind whatever was made in support of any of the grounds in the motion for new trial. And even now, in his petition for writ of certiorari, the petitioner does not yet make any such claims. In other words, the whole argument of the petition for the writ is based, not upon any fact in the case, but upon a paper argument that once the Trial Court had acted upon a motion, that the Circuit Court was thereafter powerless to correct an abuse of discretion regardless of how affirmatively and clearly that abuse of discretion appears upon the record.

The decision of the Circuit Court was clearly and manifestly the only decision which could have been rendered upon the record, and it is therefore submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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